No. 86-228

In The
Supreme Court of the United States
October Term, 1987

JUOZAS KUNGYS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO THE SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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I. THE GOVERNMENT MAY NOT AVOID THE MATERIALITY REQUIREMENT OF SECTION 1451(a) BY RELYING ON THE DEFINITIONAL SECTION 1101(f)(6)

In its Supplemental Brief, the Government refers to a definitional section [Section 1101(f)(6)] of the immigration laws as if it is a substantive basis for denaturalization in its attempt to avoid the explicit requirement of Section 1451(a) that before a citizen can be denaturalized the Government must prove that naturalization had been "procured by concealment of a material fact or by willful misrepresentation" [of a material fact] (Supp. Gov't Br. 5-16). In doing so, the Government argues that the District Court and the Third Circuit below herein and the Tenth Circuit in *United States v. Sheshtawy*, 714 F.2d 1038 (1983), all erred in concluding that, for purpose of denaturalization, Section 1101(f)(6) requires that the false testimony be material (Supp. Gov't Br. 9-10). What the courts below actually held was that the Government can not avoid the explicit "material fact" requirement of the denaturalization statute [1451(a)] by resorting to a definition of good moral character [1101(f)(6)], whose words are found only in the naturalization statute [1427(a)].

At the trial level, the Government argued the tautology that (a) false testimony alone without proof of materiality establishes lack of good moral character; (b) lawful admission requires good moral character; and thus, citizenship is "illegally procured" by one who gives any false testimony. In response the District Court held that, "The *Chaunt* case and its progeny, discussed below, certainly do not support the government's position. Therefore, again insofar as misrepresentations, under oath or otherwise, are concerned, the Government's illegal procurement ground

overlaps its concealment or misrepresentation ground." (Pet.App.C, 123a) The Third Circuit affirmed that conclusion of the District Court in stating that "Consequently, our analysis under the 'concealment of material fact or willful misrepresentation' portion of Section 1451(a) will be no different than that under the illegal procurement provision. We will not permit the government to escape the *Chaunt* materiality requirement by invoking Section 1101(f)(6)" (Pet.App.A, 28a).

In 1961, Section 1451(a) of the Immigration and Nationality Act of 1952 was amended to restore the words "illegally procured" as a comprehensive ground to include non-misrepresentational conduct and conditions as a basis for denaturalization without proof of fraud. A non-misrepresentational ground, such as contraction of a dangerously contagious disease, does not require under the illegal procurement amendment proof of a misrepresentation as to a material fact; but Congress did not delete from Section 1451(a) the requirement that, as to misrepresentations, the Government must prove that naturalization had been "procured by concealment of a material fact or by willful misrepresentation [of a material fact]." Since "illegally procured" covers non-representational facts and conditions, it is not redundant as to the "material fact" element of the misrepresentational ground. Instead, illegal procurement, if it is construed also to cover a misrepresentation, would overlap the misrepresentation of material fact ground.

Under either clause of Section 1451(a) there must be proof that citizenship was "procured" by a misrepresentation of a "material fact" before a citizen can be denaturalized. If Congress intended otherwise, it would simply have deleted the "material fact" language from Section 1451

(a), since that language would be inconsistent and contradictory if every misrepresentation in the course of an immigration proceeding could be the basis for denaturalization. At no prior time when the "illegally procured" language was part of the denaturalization statute had it been construed by the Courts or Congress to mean that a naturalized citizen could be denaturalized on the basis of any misrepresentation. Certainly there is no indication that it was ever intended to cover misrepresentations as innocuous as whether a citizen was 31 or 33 years old or was born in a rural town instead of a city.

Under the Government's faulty logic the denaturalization statute would cover both of the diametrically opposed concepts of every misrepresentation and only misrepresentations which were material. It would be nonsensical for Congress to pass a statute which excludes that which it permits. The Government fails to recognize the difference between a redundancy and what is at most an overlap, as pointed out by the District Court (Pet.App.C, 123a). Conversely, the Government also fails to recognize that the "material fact" requirement of Section 1451(a) would be eliminated and be superfluous if every misrepresentation or concealment caused citizenship to have been "illegally procured." It should be obvious to the Government that certain prior conduct (such as rape) or conditions (such as having a dangerous contagious disease) are non-representational, albeit substantive, facts that cause subsequently acquired citizenship to have been "illegally procured", irrespective of whether accompanied by a misrepresentation as to their existence. Indeed, an immigrant may unknowingly have a dangerous contagious disease and yet still be denaturalized upon its subsequent discovery. Each of those non-representational conduct and conditions

concerns what Congress viewed as matters of substance and not that which is trivial or innocuous. For instance, not every disease is a basis for denaturalization (See Appendix to Pet. Reply Br., 3a).

Before adopting the same view the Tenth Circuit articulated in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (1983), the Third Circuit herein examined the legislative history of the 1961 illegal procurement amendment to Section 1451(a) and found,

> We also find that the legislative history of the illegal procurement amendment to section 1451(a) does not evince a clear intent of Congress to provide an escape from the materiality requirement in false testimony cases. Rather, the House Report indicates an intent to allow denaturalization based on substantive facts, where, for example, no fraud or concealment was involved, without a showing of willful misrepresentation or concealment. See H.R.Rep.No.1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2982-84. The report indicates concern, for example, with naturalizations of those guilty of rape, fraud, and aid to illegal aliens. Id. at 2983. We believe Congress was concerned with cases where it was impossible to prove willful misrepresentation or concealment rather than with cases where the object of concealment was not material. (Pet.App.A, 27a).

This Court in *Fedorenko v. United States*, 449 U.S. 490, 509 (1981) held that the "illegal procurement" ground for denaturalization still required proof of materiality where the immigrant therein concealed his prior status as a concentration camp guard during World War II. It is puzzling as to how the Government, which conceded in *Fedorenko* that a misrepresentation had to be material under Section 10 of the Displaced Persons Act because it had to have been made "to gain admission into the United States", can plausably argue that the in tandem Section

1101(f)(6) language "for purpose of obtaining any benefits under [the immigration laws]", which would include gaining admission, does not require proof of a misrepresentation of a material fact when the Government attempts to fold it back into the denaturalization statute.

A. "THE ILLEGALLY PROCURED" AMENDMENT DID NOT ELIMINATE THE MATERIALITY REQUIREMENT OF SECTION 1451(a)

In *Fedorenko* the Government alleged both that petitioner had procured his citizenship illegally and that he had willfully concealed the material fact of being a concentration camp guard (*id.* at 493). The majority opinion of this Court specifically stated that one of the issues to be resolved was "whether petitioner's failure to disclose, in his application for a visa to come to this country, that he had served during the Second World War as an armed guard at the Nazi concentration camp at Treblinka, Poland, rendered his citizenship revocable as 'illegally procured' or procured by willful misrepresentation of a material fact." (*Ibid*). Petitioner therein also falsified his visa application by lying, *inter alia*, about his birthplace (*id.* at 496 n.8). In that complaint the Government made the same allegation as here that petitioner had made the false statements to secure naturalization and thus failed to satisfy the good moral character requirement of Section 1427(a) (*id.* at 498 n.11). There, as here, the District Court found that petitioner's false statement as to his birthplace was not a "material" misrepresentation (*id.* at 503 n.21).

Although the majority opinion in *Fedorenko* indicated that prior cases recognized that "there must be strict compliance with all the Congressionally imposed prerequisites to the acquisition of citizenship" (*id.* at 506), naturalized

citizenship would not be set aside as "illegally procured", even where there is an undisputed lie in the visa application unless the willful misrepresentation was about a "material fact" (*id.* at 507). *Fedorenko* presented this Court with a denaturalization case involving "the lawfulness of his initial entry into the United States", which the majority indicated that "at the outset, we must determine the proper standard to be applied in judging whether petitioner's false statements were material" (*id.* at 508).

The "plain language" of the Displaced Person's Act admonition that making a misrepresentation "for the purposes of gaining admission into the United States" shall make such displaced person not admissible did not mean that proof of any lie in an application ended the court's inquiry. As the majority in *Fedorenko* held, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material facts' " (*id.*, at 507). Since there is no appreciable difference in the "for purposes of obtaining any benefits," language of Section 1101(f)(6), the Government can not avoid the materiality requirement which applies to misrepresentations under both the "illegally procured" phrase and the "material fact" clause of Section 1451(a). Thus, the Government is wrong in contending that the courts below erred, when their decisions followed this Court's precedents in *Chaunt* and *Fedorenko*. Indeed, the decisions of the courts below were a necessary corollary to the Government's prior concession that the plain language of "for purposes of gaining admission" requires proof of the materiality of any misrepresentation.

It is implicitly clear from all of the opinions in *Fedorenko* that the "illegally procured" addition to the language of Section 1451(a) did not eliminate the requirement

that the Government prove the actual existence of a material fact (*id.* at 509, 524,, 528 n.8, 537). Although the majority of the Court found it "unnecessary to resolve the question whether *Chaunt's* materiality test also governs false statements in visa applications," the majority did give a minimal definition that "a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa" (*id.* at 509). Here, the District Court unassailably found that petitioner's misrepresentations would have had no effect whatsoever on petitioner's eligibility for a visa and had he "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet. App.C., 119a). Thus, irrespective of whether *Chaunt* applies at the visa stage, petitioner did not "illegally procure" his visa in view of the materiality requirement of *Fedorenko*.

The majority in *Fedorenko* cited with approval to *United States v. Rossi*, 299 F.2d 650, 652 (CA 9, 1962) that it was a foregone conclusion that a false statement in a visa had to be evaluated based upon its effect on the petitioner's admissibility and stated, "It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country" (*id.* at 509). The Court's analysis referred to the Section 1427(a) requirement that an applicant for citizenship had to be lawfully admitted to the United States and then pointed out that the petitioner there, as the petitioner here, entered this country under the Immigration Act of 1924, section 13(a) of which was construed by the courts to mean that a visa obtained through a *material* misrepresentation was not valid, citing to *Ablett v. Brownell*, 240 F.2d 625, 629 (CA D C 1957) and *United States ex rel. Jankowski v. Shaughnessy*, 186 F.2d 580, 582 (CA 2, 1951).

Thus, not only would this Court have to treat the "material fact" requirement of Section 1451(a) as a nullity, but also this Court would have to disregard the common analysis in all of the opinions in *Fedorenko* and *Chaunt* that proof of a material fact is an indispensable element in denaturalization proceedings, in order to adopt the Government's argument that it need not prove materiality when it attempts to incorporate the false testimony definition of Section 1101(f)(6) into the "illegally procured" phrase of amended Section 1451(a).

B. THE 1961 "ILLEGALLY PROCURED" AMENDMENT IS NOT APPLICABLE TO PETITIONER'S 1954 CITIZENSHIP

The Government's argument that petitioner is subject to denaturalization for want of good moral character irrespective of the materiality of his misrepresentations is based solely on incorporating that definition of Section 1101(f)(6) subliminally into the "illegally procured" amendment of Section 1451(a) in 1961 (Supp. Gov't Br. 5-16). Yet, when petitioner applied for citizenship on October 23, 1953 and when he was granted citizenship in February 1954, "illegally procured" was not part of the Immigration and Nationality Act, enacted on June 27, 1952 and known as the McCarren Act, 8 U.S.C. § 1451(a). His petition for citizenship referred only to the then statutory standard of "concealment of a material fact" (J.A. 42). Indeed, the 1961 amendment is silent as to any retroactive application (See 1961 U.S. Code Cong. & Admin. News 729); whereas the 1952 McCarren Act contains a Savings Clause, Section 405, in which Congress assured that "when an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be deter-

mined under the provisions of law in effect on the date of the issuance of such visa . . ." Petitioner's visa was issued on March 4, 1948 and he was not excludable under the classes of persons listed on the visa application and as set forth in the regulations under the Immigration Act of 1924 (J.A. 31-32).

Since petitioner correctly disclosed such information as would have had a material bearing on whether to grant him a visa, as the District Court so found, his entry into the United States was in accordance with the laws then in effect. Since Congress expressly assured him that his admissibility shall be determined on the basis of the laws *then* in effect, how can the Government plausably argue that Congress, by its silence in 1961, could retroactively convert his lawful entry in 1948 into an "illegally procured" entry in 1987 based upon misrepresentations judicially found to be immaterial and found to have had no effect whatsoever on the issuance of his visa?

In view of its findings that none of petitioner's representations was material and that "illegally procured" overlapped the material fact requirement of Section 1451 (a) even after such amendment, the District Court concluded it was "unnecessary" to address petitioner's argument the 1961 Amendment could not apply to him. The District indicated its awareness that the Third Circuit in *United States v. Riela*, 337 F.2d 986, 989 (CA 3 1964) directed that, "The legality of the defendant's naturalization must be determined under the applicable provisions of the statute as they were at the time of his admission to citizenship" (Pet.App. C, 124a). The Third Circuit herein failed to opine on the applicability of the "illegally procured" amendment, presumably because it agreed with the District Court's ruling that the Government cannot avoid

the "material fact" requirement of a denaturalization proceeding by resort to Section 1101(f)(6). For further amplification as to why the 1961 "illegally procured" amendment cannot constitutionally be applied retroactively to petitioner, *see* Petitioner's Reply Brief to the Brief of the United States, 16-20.

II. THE CHAUNT "MATERIALITY" HOLDING REQUIRES PROOF OF AN ULTIMATE DISQUALIFYING FACT

The Government asserts that this Court in *Chaunt* concluded that the Government is not required to prove an ultimate disqualifying fact to establish materiality under the alternative approach because of the use of the words "might" and "possibly" in Justice Douglas' opinion (Supp. Gov't Br., 22-26). Since Chaunt retained his naturalized citizenship despite having falsely denied he had ever been arrested and since those arrests "might" have involved distributing literature and making speeches "possibly" showing his activities as a district organizer for the Communist Party in Connecticut, it is puzzling as to how the Government can still argue that the holding of *Chaunt* "strongly suggests that proof of an ultimate disqualifying fact is not required" (Supp. Gov't Br., 23). Despite the Government's proof of Chaunt's false denial of his arrests, that was not deemed by this Court to prove lack of good moral character because the "totality of circumstances" surrounding the arrests showed they did not involve "moral turpitude", but instead involved matters of "extremely slight consequences." *Chaunt v. United States, supra* at 353-354. This Court thus refused "to base materiality on the tenuous line of investigation that might have led from the arrests to the alleged communistic affiliation . . ." (*id.*, at 354-355).

So too in the instant case the petitioner's false date and place of birth are of "extremely slight consequences" and do not "involve moral turpitude within the meaning of the law." (*id.* at 353). As in *Chaunt*, "While disclosure of them was properly exacted, the arrests [misrepresentations of date and place of birth] were not reflections on the character of the man seeking citizenship" (Ibid) (brackets added). There, as here, "On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act" (*id.*, at 354).

The Government failed in its attempt to denaturalize Chaunt because it did not prove by clear, unequivocal and convincing evidence either that the disclosure of his arrests would have warranted denial of citizenship or that their disclosure "might" have been useful in an investigation "possibly" leading to the discovery of other facts warranting denial of citizenship. The ultimate fact that the Government failed to prove was Chaunt's lack of intent to renounce foreign allegiance. The false denial of arrests which "might" have shown "possible" Communist affiliation was too tenuous to link Chaunt to the requisite ultimate disqualifying fact of lack of intent to renounce foreign allegiance.

If there was any post-*Chaunt* doubt that the "material fact" requirement of the denaturalization statute requires proof of an ultimate disqualifying fact no matter how approached, that doubt should have been dispelled by each of the opinions of this Court in *Fedorenko*. Although the majority affirmed the judgment, it expressly rejected the

rationale of the Court of Appeals that the "might" or "possibly" language of *Chaunt* dispensed with the requirement to prove an ultimate fact warranting denial of citizenship (*id.*, at 504 n.22) in stating, "We affirm, but for reasons which differ from those stated by the Court of Appeals." (*id.*, at 505). The majority held that if Fedorenko had disclosed his prior status as a concentration camp guard, that fact would have made him ineligible for a visa and thus failure to disclose that disqualifying fact made his citizenship illegally procured (*id.*, at 509). Certainly, Justice Blackmun left no doubt as to his analysis of *Chaunt* and the cases prior thereto, which the Government also misconstrued, when he opined, "Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved" (*id.*, at 524). So too, Justice Stevens left no doubt as to what proof is required when he unequivocally opined, "Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated" (*id.*, at 537).

In view of this Court permitting Chaunt to retain his citizenship despite his false denial of having been arrested, it is submitted that the "sounder construction" of the word "possibly", if there is to be an alternative approach to finding materiality, is that adopted by the District Court in *Fedorenko*, 455 F. Supp. 893, 915-916 (S.D. Fla. 1978) and as explained by Justice Blackmun, to wit, "Because, what would 'possibly' be discovered is not 'facts which might warrant denial of citizenship' but '*other* facts war-

ranting denial of citizenship' (emphasis [there] supplied), the 'second test' simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known" (*id.*, at 524 n.13). That explanation by Justice Blackmun is consistent with Justice Douglas' first expression of the alternative approach which did not contain the words "possibly" or "useful" (See 364 U.S. at 353—"disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship").

However expressed in *Chaunt* and *Fedorenko*, it should be clear to the Government that the alternative approach to proving materiality still requires proof of the actual existence of an independent, ultimate disqualifying fact. The only real difference between the first approach and the alternative approach to proving materiality is whether the disqualifying fact is the fact misrepresented or concealed in the immigration papers or is the independent fact whose existence is directly linked to the failure to disclose the truth of the misrepresented fact.

If there still is to be an alternative approach to proving materiality, what needs clarification is the level of proof needed to connect the suppressed fact to the independent, ultimate disqualifying fact. In his dissent in *Fedorenko*, Justice White appeared to require such linkage when he stated, "The Government should be required to prove that an investigation would have occurred if a truthful response had been given . . ." (*id.*, at 528 n.8), and yet he appeared to prefer creating a rebuttable presumption as to what other facts such an investigation might have uncovered, in stating, "The defendant could rebut the Government's showing that the investigation might have

led to the discovery of facts justifying denial of citizenship by establishing that the underlying facts would not have justified denial of citizenship" (*Ibid*).

At the trial the Government realized it had to establish an ultimate disqualifying fact and attempted to do so through the false testimony of former Vice Consul Seymour Finger that the regulations then in effect required the applicant to be a victim of Nazi persecution in order to be eligible for a non-preference quota immigration visa (J.A. 218, 227-228). Petitioner rebutted that testimony by putting in evidence the actual regulation then in effect [22 C.F.R. § 61.313(a)(3)(i)(c)] and the Presidential Directive of December 22, 1945 as to displaced persons incorporated into that regulation (Pet.App. E, 141a; Pet. App. F, 143a-151a). Neither contained any such requirement and the District Court genteely found that Mr. Finger was "in error" (Pet.App. C, 120a n.7). At the trial, the Government admitted they were unable to produce any such regulation (Lodging, R. 1298), and at the first oral argument before this Court the Government conceded that no such regulation ever existed in disclosing, "We concede there's no statute or regulation" (TR Oral Argument 35).

Lacking proof of any disqualifying fact, the Government has resorted to asserting erroneously that *Chaunt* and its predecessors dispensed with the requirement that the Government establish materiality by proving an ultimate disqualifying fact (Supp. Gov't Br. 22-26). The Government's Supplemental Brief on that Point II.A enigmatically is silent as to *Fedorenko* and its citation with approval at 509 to the post-*Chaunt* opinion of *United States v. Rossi*, 299 F.2d 650, 652 (CA 9 1962) for the principle that, "It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms

of its effect on the applicant's admissibility into this country."

A. IT WOULD BE AN UNWARRANTED OVERSIMPLIFICATION TO DILUTE THE MATERIALITY REQUIREMENT MERELY TO MEAN EITHER "A NATURAL TENDENCY TO INFLUENCE" OR "CAPABLE OF INFLUENCING"

Although it appears settled that however proof of a material fact is approached it still requires the existence of a disqualifying fact, the Government also seeks to dilute "material fact" in the denaturalization statute by redefining it with the twin definition; (1) "a natural tendency to influence"; or (2) "was capable of influencing" the tribunal or governmental official (Supp. Gov't Br. 24-30). Although expressed in two different ways the Government argues that both are the "ordinary meaning" Congress intended and are the way the adjective "material' 'is treated in the perjury and false statement criminal cases in some circuits. Yet, nowhere in the legislative history of the denaturalization statute or any amendment thereto is there any reference to any Congressional intent to incorporate the definition of "material" from any other statute or from certain cases involving criminal prosecution for false swearing or perjury.

The "ordinary meaning" of "material fact" found in Webster's Dictionary is "having real importance or great consequences", as in "facts material to the investigation" (Webster's New Collegiate Dictionary, 1977). The "ordinary meaning" of "material" found in Black's Law Dictionary is "Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form", and the "ordinary meaning" of "material fact" is defined for contracts as

"One which constitutes substantially the consideration of the contract, or without which it would not have been made", and for pleading and practice as "One which is essential to the case, defense, application, etc. and without which it could not be supported" (1968 edition of Black's Law Dictionary, p.1128). It seems reasonably obvious that the "ordinary meaning" of the adjective "material" when used to modify "fact" in the context of the kind of misrepresentation that citizenship was "procured by" is that it requires that the "fact" misrepresented be of such "importance" that, but for its being misrepresented, citizenship would not have been procured thereby.

Requiring a "material fact" to be outcome determinative is fully consistent with what this Court held in *Schneiderman, Costello, Chaunt* and *Fedorenko* and how this Court analyzed "material fact" in *Anderson v. Liberty Lobby, Inc.*, 475 U.S. — (1986). The Government's proposed redefinitions of material fact as a mere tendency or capacity to influence are equivalent to revising the denaturalization statute to be satisfied by proof of mere possibly "relevant" facts, as distinct from "material" or outcome determinative facts. Such diluted revisions of the denaturalization statute would involve a degree of speculation and would be inconsistent with the firmly entrenched, "unequivocal" denaturalization evidentiary standard enunciated in *Schneiderman* which Congress intended to survive the revisions of the 1952 Immigration and Nationality Act (See Appendix to Petitioner's Reply Brief, 1a-2a). That which merely has a tendency or capacity to influence does not unequivocally establish that the truth of the undisclosed fact would clearly have caused the immigration official to deny a visa application or reject a petition for citizenship. Indeed, at the trial in *Fedorenko* the immigration examiner testified that the

prior falsification of his birthplace in his visa application was "not a cause for concern" at the citizenship stage (*Fedorenko, supra,* at 503 n.21).

III. ONLY UNWARRANTED JUDICIAL REVISION COULD CHANGE THE CAUSAL "PROCURED BY" REQUIREMENT OF SECTION 1451(a) TO a SELF OBVIOUS DESCRIPTION THAT THE MATERIAL REPRESENTATION OR CONCEALMENT TO OBTAIN CITIZENSHIP HAD TO HAVE BEEN MADE "IN THE COURSE OF" THE VISA OR NATURALIZATION PROCEEDINGS

The Government seeks to avoid the denaturalization statutory requirement that there be a cause and effect relationship between the material fact misrepresented and the citizenship thereby procured. The Government does so by revising the plain statutory language "procured by concealment of a material fact or by willful misrepresentation" to read that everyone should be denaturalized who "obtained citizenship *after* concealing a material fact or making a willful misrepresentation *in the process* of procuring a visa or citizenship" (Supp. Gov't Br. 30-33) (emphasis added). One would ask the Government where else would a misrepresentation in obtaining citizenship be made other than "in the process of" procuring a visa or citizenship; and when else would citizenship be obtained then *after* such a misrepresentation had been made? There is no justification for the Government's unwarranted revision of the "but for" or casual requirement embodied in "procured by" into an oversimplified sequential occurrance that the acquisition of citizenship merely follows the making of the misrepresentation, thereby converting "procured by" into "procured in the process". It is false logic to argue post hoc equals propter hoc.

As demonstrated *supra*, the Government is simply wrong in its further argument that "illegally procured or procured by" would make the first phrase redundant instead of simply overlapping. For a sounder analysis of the "procured by" requirement of the denaturalization statute which is consistent with this Court's actual materiality holdings in *Chaunt*, *Fedorenko* and *Schneiderman*, see Supp. Br. of Pet. on Reargument, 26-29.

Taking the Government's arguments as a whole would require totally revising the denaturalization statute to read every immigrant shall be denaturalized who "obtained citizenship after concealing in the process of procuring a visa or citizenship any fact; or, if not any fact, any fact which had a natural tendency to influence or was capable of influencing a government official, even if there is no proof that, if the fact had been disclosed, it would have influenced the official; or, even if it had no such tendency or capacity, if such a concealed fact might have been useful or, even if not useful to an investigation, if there was any possibility an investigation might have led to other facts having a tendency to be of interest, irrespective of whether those possible other facts constituted ultimate disqualifying facts." The Government would thus have the courts worship the bureaucratic process of immigration as a god in itself, even if the substance was innocuous or immaterial. If that were to become the standard then any question the Government puts on an immigration form thereby becomes "material". As Justice Blackmun indicated in *Fedorenko*, "I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt*." (*supra*, at 524).

When all else fails the Government falls back on its repeated paean that giving "procured by" its plain, "but-for" meaning would make Section 1451(a) a license to lie

in applications for citizenship. If that were the case, then the Government could always argue that whenever Congress imposed a legal requirement in addition to the making of the false statement, such as proof of materiality in the perjury and false swearing statutes, it is a license to encourage witnesses to lie in court or before grand juries. The deterent to all citizens for false swearing is fine and imprisonment. As this Court observed in *Fedorenko*,

> "*Chaunt's* rigorous definition of materiality, it is true may occasionally benefit an applicant who conceals disqualifying information. Yet, practically and constitutionally, naturalized citizens as a class are not less trustworthy or reliable than the native born. The procedural protection of the high standard of proof is necessary to assure the naturalized citizen his right, equally with the native born, to enjoy the benefits of citizenship in confidence and without fear" (*supra*, at 525 n.14).

Respectfully submitted,

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